

JS 44 (Rev. 02/19)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

CAFARO-PEACHCREEK JOINT VENTURE PARTNERSHIP

(b) County of Residence of First Listed Plaintiff ERIE
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Matthew W. McCullough, Esq., MacDonald, Illig, Jones & Britton LLP,
100 State Street, Suite 700, Erie, PA 16507-1459
(814) 870-7602

DEFENDANTS

THOMAS W. WOLF, in his official capacity as the Governor of the Commonwealth of Pennsylvania, and RACHEL LEVINE, M.D., in her official capacity as Secretary of the PA Department of Health

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Tort Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSDI Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
U.S. Constitution - Fifth and Fourteenth Amendments

Brief description of cause:

Challenge to Governor of Pennsylvania's Orders Prohibiting Plaintiff from Operating Business

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
Injunctive Relief

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE
06/17/2020

SIGNATURE OF ATTORNEY OF RECORD
s/Matthew W. McCullough, Esquire

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

JS 44A REVISED June, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (☒ Erie ☐ Johnstown ☐ Pittsburgh) calendar.

1. **ERIE CALENDAR** - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean, Venang or Warren, OR any plaintiff or defendant resides in one of said counties.
2. **JOHNSTOWN CALENDAR** - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset OR any plaintiff or defendant resides in one of said counties.
3. Complete if on **ERIE CALENDAR**: I certify that the cause of action arose in Erie County and that the Plaintiff resides in Erie County.
4. Complete if on **JOHNSTOWN CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

1. ☐ This case is related to Number _____. Short Caption _____.
2. ☒ This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:

CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit or involves the same issues of fact or it grows out of the same transactions as another suit or involves the validity or infringement of a patent involved in another suit **EMINENT DOMAIN:** Cases in contiguous closely located groups and in common ownership groups which will lend themselves to consolidation for trial shall be deemed related.

HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PART C

I. CIVIL CATEGORY (Select the applicable category).

1. ☐ Antitrust and Securities Act Cases
2. ☐ Labor-Management Relations
3. ☐ Habeas corpus
4. ☐ Civil Rights
5. ☐ Patent, Copyright, and Trademark
6. ☐ Eminent Domain
7. ☒ All other federal question cases
8. ☐ All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest
9. ☐ Insurance indemnity, contract and other diversity cases.
10. ☐ Government Collection Cases (shall include HEW Student Loans (Education), V A Overpayment, Overpayment of Social Security, Enlistment Overpayment (Army, Navy, etc.), HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, SBA Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.)

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct

s/Matthew W. McCullough

Date: June 17, 2020

ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH FORMS MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAFARO-PEACHCREEK JOINT
VENTURE PARTNERSHIP,
Plaintiff

v.

THOMAS W. WOLF, in his official
capacity as the Governor of the
Commonwealth of Pennsylvania, and
RACHEL LEVINE, M.D., in her official
capacity as Secretary of the Pennsylvania
Department of Health,
Defendants

Civil Action No. 1:20-CV-155

FILED ELECTRONICALLY

COMPLAINT

Plaintiff Cafaro-Peachcreek Joint Venture Partnership, by its attorneys, MacDonald, Illig, Jones & Britton LLP, files this Complaint against defendants Thomas W. Wolf, in his official capacity as the Governor of the Commonwealth of Pennsylvania, and Rachel Levine, M.D., in her official capacity as Secretary of the Pennsylvania Department of Health, and states the following in support thereof:

I. Parties

1. Plaintiff Cafaro-Peachcreek Joint Venture Partnership ("Cafaro-Peachcreek") is a general partnership organized and existing under the laws of the State of Ohio, with its headquarter offices and principal place of business located at 5577 Youngstown-Warren Road, Niles, OH 44446.

2. Plaintiff Cafaro-Peachcreek owns the Millcreek Mall, located on upper Peach Street and Interstate 79 in Millcreek Township, Erie County, Pennsylvania. The Millcreek Mall

includes an enclosed mall building occupied by numerous retail business tenants, some with external entrances but most accessible only from within the mall common areas.

3. The vast majority of retail business tenants in the Millcreek Mall's enclosed mall building have been forced to close and remain closed since March 16, 2020 as a result of orders issued by defendants Thomas W. Wolf ("Wolf") and Rachel Levine, M.D. ("Levine") in response to the coronavirus outbreak ("COVID-19") pandemic, while other virtually identical retail businesses in Erie and surrounding counties in Pennsylvania, as well as nearby states, have been permitted to reopen solely because they are not located within an enclosed mall and/or have external entrances.

4. Defendant Wolf, named in his official capacity, is the Governor of the Commonwealth of Pennsylvania and is generally charged with enforcing the laws of the Commonwealth of Pennsylvania.

5. Defendant Levine, named in her official capacity, is the Secretary of the Commonwealth of Pennsylvania Department of Health and is generally charged with enforcing the laws regarding the public health of the Commonwealth of Pennsylvania and its residents, including the COVID-19 Closure Orders at issue in this case.

II. Jurisdiction And Venue

6. This Court has jurisdiction to hear this case under 28 U.S.C. §§ 1331, 1343(a)(3)(4), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges under the United States Constitution.

7. Venue is proper under 28 U.S.C. § 1391(b), because a substantial part of the events giving rise to plaintiff Cafaro-Peachcreek's claims occurred in this district and division.

III. Factual Background

A. The March 19, 2020 Business Shutdown Order

8. On March 16, 2020, defendant Wolf announced that guidance already in effect in several Pennsylvania counties, requiring all non-essential businesses to shut down, would now be in effect statewide, beginning March 17, 2020, and would continue for 14 days.

9. On March 19, 2020, defendants Wolf and Levine issued separate orders which indefinitely prohibited the operation of all "non-life sustaining" businesses throughout the Commonwealth of Pennsylvania ("Business Shutdown Order" or "Business Shutdown Orders"). Copies of the Business Shutdown Orders are attached hereto as Exhibits A and B.

10. Defendant Wolf, as set forth in the Business Shutdown Order, declared the ability to control the movement of residents of the Commonwealth of Pennsylvania, and to order that citizens of the Commonwealth not utilize their private property, without providing the citizens prior notice nor an opportunity to be heard, and without providing just compensation.

11. The Business Shutdown Order also cites to defendant Levine's purported authority under the Administrative Code "to determine and employ the most efficient and practical means for the prevention and suppression of disease . . . includ[ing] isolation, quarantine, and any other control measure needed."

12. The Business Shutdown Order prohibited businesses that defendant Wolf determined were not "non-life sustaining" from operation at their physical locations, providing in part, "No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public."

13. A list of businesses that defendant Wolf determined were "life sustaining" was issued contemporaneously with the Business Shutdown Order. Without explanation, revised lists were issued on March 20, 2020 and several times thereafter.

14. A business operating out of compliance of the Business Shutdown Order is subject to fines and penalties, and possible police action, including denial of government assistance and disaster relief.

15. The Business Shutdown Order does not provide for prior notice and an opportunity to be heard relative to the mandated shutdown.

16. As described by the Pennsylvania Supreme Court in *Friends of Danny DeVito, et al. v. Wolf, et al.*, 2020 WL 1847100 (Pa. 2020), the "waiver" process, in actuality provided no relief to non-life-sustaining businesses. The Court described the waiver process not as an administrative review to request relief to allow non-life-sustaining businesses to operate, but rather a petition for the executive to reconsider whether a business was in fact life-sustaining or not.

17. As a result, in an abdication of Constitutional tenets of separation of powers and procedural due process, persons seeking redress from the Business Closure Order are not entitled to judicial review of the decision because it is an executive, instead of an administrative, decision. *Id.* at *22.

18. Therefore, plaintiff Cafaro-Peachcreek was not eligible, let alone afforded, any type of pre-deprivation or post-deprivation due process.

B. The Millcreek Mall

19. Plaintiff Cafaro-Peachcreek owns the Millcreek Mall, located on upper Peach Street and Interstate 79 in Millcreek Township, Erie County, Pennsylvania.

20. The Millcreek Mall has been serving the community since 1975 and has been expanded and renovated several times over the years.

21. The Millcreek Mall is owned by plaintiff Cafaro-Peachcreek, which is one of several entities based in Niles, Ohio doing business under the trade name "Cafaro." Anthony M. Cafaro, Jr. ("Mr. Cafaro") generally serves as Cafaro's Co-President.

22. Cafaro owns 12 enclosed malls in nine different states (PA, OH, WV, VA, KY, TN, IA, MI and WA), including the Millcreek Mall.

23. Although all enclosed malls in Pennsylvania were required to close for some period of time in response to the COVID-19 pandemic, the Millcreek Mall is one of the few such enclosed malls in Pennsylvania that remains closed at present.

24. Further, the Millcreek Mall is the only enclosed mall owned by Cafaro that remains closed at present.

25. The Millcreek Mall is part of the larger Millcreek Mall Complex, which consists of approximately 2.2 million square feet of retail stores, numerous restaurants, four hotels and an outdoor streetscape. Only the Millcreek Mall itself, as enclosed mall space, is the subject of this lawsuit.

26. The Millcreek Mall is an enclosed mall building, which consists of approximately 1.1 million square feet of leasable tenant space and in excess of 100,000 square feet of common space, mostly large cavernous corridors open to the public. A diagram of the enclosed mall space is attached as Exhibit C.

27. The Millcreek Mall's enclosed building currently has at least 139 retail tenant spaces, the vast majority of which do not have independent external access and are accessible only via internal mall corridors and common space.

28. The main mall building has five anchor tenant spaces, each having direct access to internal mall corridors as well as one or more external entrances.

29. In addition, the main mall building has several contiguous tenant spaces around its perimeter, some with only direct external access and others with both internal and external access.

30. Retailers occupying interior tenant spaces are separated from each other by floor to ceiling walls, and have large entranceways opening into the mall corridors. Unlike non-mall retailers, when Millcreek Mall is open to the public, the entranceways into these interior businesses are wide open, and patrons entering and exiting are not required to open doors to pass through narrow doorways. In other words, the design of Millcreek Mall inherently minimizes common touchpoints.

31. The interior common areas, including the main and peripheral corridors and the Food Court area, are very wide, ranging in width from approximately 20 feet to 60 feet.

32. The interior common areas, including the main and peripheral corridors and the Food Court, have very high ceilings ranging in height from 15 feet to 30½ feet.

33. Millcreek Mall, just like currently open businesses such as Walmart, Home Depot, Giant Eagle and other various retailers, is required to adhere to International Building Code ("IBC) for HVAC systems and air quality.

34. Each individual tenant space inside the Millcreek Mall, including spaces without external entrances, has its own HVAC unit and air exchange system and each tenant is responsible for complying with the IBC for HVAC systems and air quality.

C. Millcreek Mall Is Excluded From Reopening In Yellow Phase

35. On March 16, 2020, defendant Wolf mandated that non-essential businesses close for 14 days in an effort to stop the spread of COVID-19.

36. Consequently, plaintiff Cafaro-Peachcreek closed all non-essential businesses within the Millcreek Mall March 16, 2020 at 6:00 p.m. With limited exceptions, the Millcreek Mall and the majority of its retail business tenants have been closed since then.

37. As stated above, defendants Wolf and Levine subsequently issued Business Shutdown Orders on March 19, 2020.

38. On April 22, 2020, defendant Wolf announced his plan for reopening Pennsylvania with a targeted start of May 8, 2020. Reopening was to occur in three phases - red, yellow and green - based upon conditions in a particular county, counties or region.

39. Defendant Wolf's April 22, 2020 Press Release included a link to the full reopening plan called "Process to Reopen Pennsylvania" ("Reopening Plan").

40. Neither the April 22, 2020 Press Release nor the linked Reopening Plan stated that enclosed malls such as Millcreek Mall would not be permitted to reopen like all other non-mall based businesses (except those specifically excluded) once Erie County entered the Yellow Phase.

41. On May 1, 2020, defendant Wolf issued a Press Release announcing that 24 counties in the northwest and north-central regions of the state, including Erie County, would move from red to yellow beginning Friday, May 8, 2020.

42. According to the May 1, 2020 Press Release, these 24 counties were deemed ready to move to Yellow Phase reopening because of low per-capita case counts, the ability to conduct contact tracing and testing, and appropriate population density to contain community spread.

43. The May 1, 2020 Press Release stated that many businesses would be permitted to reopen during the Yellow Phase while adhering to certain guidance to be updated and published on May 4, 2020.

44. The May 1, 2020 Press Release also identified certain businesses that would not be permitted to open during the Yellow Phase (such as gyms, spas, hair salons, casinos and theaters), and expressly stated that "[a]ll businesses not specifically mentioned as restricted from reopening may reopen if they follow the forthcoming guidance." Indoor or enclosed malls such as Millcreek Mall were not specifically identified as restricted.

45. Upon learning of defendant Wolf's May 1, 2020 announcement that Erie County was moving to the Yellow Phase for reopening, plaintiff Cafaro-Peachcreek began preparations to reopen the Millcreek Mall.

46. On May 4, 2020, defendants Wolf and Levine issued Guidance for Businesses Permitted to Operate which again stated that, [i]n counties that have been designated as in the Yellow Phase, all businesses, except those categories specifically excluded in the [Reopening Plan] and [defendants'] orders, are permitted to conduct in-person operations, so long as the businesses follow CDC and Department of Health guidelines." Indoor or enclosed malls such as Millcreek Mall were not identified as "specifically excluded."

47. As of May 4, 2020, therefore, businesses permitted to re-open and conduct in-person operations during the Yellow Phase, unless specifically excluded, included not only freestanding and plaza front retailers, but also retailers that operate within an enclosed mall such as Millcreek Mall.

48. In reviewing the May 4, 2020 Guidance, plaintiff Cafaro-Peachcreek believed that strict adherence to that Guidance and CDC and Department of Health guidelines was (and is)

achievable at Millcreek Mall, particularly given what was anticipated to be a gradual return of shoppers and typically slower late spring and early summer customer traffic.

49. Upon the issuance of the May 4, 2020 Guidance, Mr. Cafaro initiated a telephone conference with the Erie County Health Department ("ECHD") and explained Millcreek Mall's preparations and protocol to open the mall consistent with state and federal guidelines. Mr. Cafaro was informed, however, that ECHD was seeking confirmation from Harrisburg as to the permissibility of malls opening in the Yellow Phase, as the ECHD previously had been informed that enclosed malls would not be permitted to open until the host county was in the Green Phase of reopening.

50. On May 5, 2020, Mr. Cafaro sent an email to the ECHD confirming that Millcreek Mall was making preparations to reopen on Friday, May 8 in strict accordance with defendant Wolf's May 4, 2020 Guidance. Mr. Cafaro further advised that formal announcements to Millcreek Mall tenants and the media would be delayed until after hearing back from the ECHD, but in the meantime management would continue to assemble information, signage and other communications to be issued to mall tenants and displayed in the mall common areas.

51. On the evening of May 5, 2020, Mr. Cafaro was notified that ECHD had received a verbal directive from the state that enclosed malls would not be permitted to reopen on May 8 when Erie County entered the Yellow Phase and that revised guidance would be forthcoming.

52. This verbal directive, much like previous communications from the state, was contrary to earlier communications from defendant Wolf. In fact, throughout this lengthy closure, the communications from defendants Wolf and Levine have been unclear, inconsistent, contradictory, ambiguous and otherwise difficult to interpret.

53. Upon learning that Millcreek Mall and other enclosed malls would not be permitted to reopen during the Yellow Phase, Mr. Cafaro had multiple communications with local Erie County officials seeking an explanation as to why there had been a sudden change in position and that enclosed malls now were excluded from reopening, particularly while competitive retail businesses in stand-alone facilities and strip malls or plazas were permitted to reopen.

54. On May 6, 2020, ECHD forwarded to Mr. Cafaro an e-mail from Erin Wells, Director of the Governor's Northwest Regional Office, to Kathy Dahlkemper, County Executive of Erie County, which simply stated, "Under Yellow-designation - Indoor shopping malls are closed, except for stores with external entrances and life sustaining businesses." A copy of this email is attached hereto as Exhibit D.

55. As a result of this stance taken by defendants Wolf and Levine, enclosed malls such as Millcreek Mall remained unable to open to the public until the county in which the mall is located moves to the Green Phase.

56. Subsequent to May 6, 2020, Mr. Cafaro made numerous requests of local and state officials to reconsider the restriction prohibiting enclosed malls to open in counties achieving Yellow Phase and to explain the rationale behind the continued closure of enclosed malls.

57. On May 8, 2020, defendants Wolf and Levine announced that 13 additional counties would move to Yellow Phase on Friday, May 15, 2020. Erie County remained in Yellow Phase and the Millcreek Mall remained closed.

58. On May 15, 2020, defendant Wolf announced that 12 additional counties would be moving to Yellow Phase on Friday, May 22, 2020. Again, Erie County remained in Yellow Phase and the Millcreek Mall remained closed.

59. On May 15, 2020, Mr. Cafaro spoke with a representative of the ECHD who advised that no change of direction for Erie County in general or for the status of Millcreek Mall had been conveyed from Harrisburg, and that Harrisburg was providing little to no responses to inquiries from ECHD.

60. On May 20, 2020, representatives of several owners of mall properties in Pennsylvania had a lengthy conference call with defendant Wolf's Chief of Staff and Pennsylvania's Attorney General, during which the mall owners presented evidence explaining why an enclosed mall environment is safe and should be permitted to be open to the public during the Yellow Phase. Although they were told that the state would respond on May 26, 2020, the state did not respond, and no change has been forthcoming from defendants Wolf or Levine.

61. On May 22, 2020, defendant Wolf announced additional changes in county status, including eight additional counties moving to the Yellow Phase and, for the first time, 17 counties moving from Yellow Phase to Green Phase on Friday, May 29, 2020, and the remainder of Red counties moving to Yellow Phase on June 5, 2020. Erie County remained in Yellow Phase and the Millcreek Mall remained closed.

62. On May 26, 2020, defendant Wolf broke pattern and announced that Centre County also would move to Green Phase on May 29, 2020, joining the 17 counties previously announced. Erie County, however, remained in Yellow Phase and the Millcreek Mall remained closed.

63. On May 29, 2020, defendant Wolf announced that 16 additional counties would be moving to the Green Phase on June 5, 2020. Erie County remained in Yellow Phase and the Millcreek Mall remained closed.

64. On June 2, 2020, various Erie County officials including, among others, Senators Dan Laughlin, Michele Brooks and Erie County Executive Kathy Dahlkemper, jointly sent

defendant Wolf a letter which requested that Erie County be immediately moved from Yellow Phase to Green Phase. Within the letter, the officials explained that "moving Erie to 'green' is actually in the best interest of the safety and security of [Erie County] citizens." In addition, the Erie County officials explained that leaving Erie County as an "island of yellow" was further harming an already "crippled community economy." A copy of the June 2, 2020 letter is attached hereto as Exhibit E.

65. On June 5, 2020, defendant Wolf announced that 12 additional counties would move to Green Phase on June 12, 2020, and the final 10 counties currently in Red Phase would move to Yellow Phase also on June 12. Erie County remained in Yellow Phase and the Millcreek Mall remained closed.

66. Most recently, on June 12, 2020, defendant Wolf announced that eight more counties will move to the Green Phase on June 19, 2020. Erie County was not one of those counties, and unless Erie County does move to Green Phase on shorter notice (as did Centre County) or unless an exemption or reconsideration of Millcreek Mall's status is granted, Millcreek Mall will remain closed.

67. As of June 12, 2020, only 21 of Pennsylvania's 67 counties remained in the Yellow Phase, and 46 counties were in the Green Phase.

68. Erie County was among the first group of 24 counties to move from Red Phase to Yellow Phase on May 8, 2020, but as of June 12, 2020, Erie County is the only one of that first group of Yellow Phase counties to remain in the Yellow Phase.

69. As of June 19, 2020, an additional eight counties will move to the Green Phase, meaning that 54 of Pennsylvania's 67 counties will be in the Green Phase, but Erie County will remain in Yellow Phase.

70. As of June 19, 2020, Erie County will be the only western Pennsylvania county and the only Pennsylvania county within 200 miles to remain in the Yellow Phase.

71. Despite numerous communications with and requests to state and local government officials, plaintiff Cafaro-Peachcreek has never received an explanation of any kind as to why defendants Wolf and Levine have refused to allow Millcreek Mall or other enclosed malls in Pennsylvania to reopen during the Yellow Phase, despite:

- a. allowing mall-based businesses with external access to reopen, when such businesses differ from other mall-based businesses with only internal access only insofar as they have external access;
- b. the much broader allowance for most other similar retail businesses to open, including strip malls and plazas;
- c. allowing "life-sustaining" businesses located within an enclosed mall and without direct external access to remain open and accessible via mall common areas otherwise off limits to non-life sustaining businesses within the mall;
- d. allowing the reopening of stand-alone big box facilities and businesses such as Target and Walmart, which not only have far less ability to social distance but which also function as "mini-malls" with non-owned retail tenants occupying space and conducting business within the confines of their larger retail spaces; and
- e. allowing the reopening of mall based anchor stores that have interior and exterior entrances solely based on the fact that they have exterior entrances, and where such anchor stores sublease space to independent tenants which conduct business within the confines of their larger retail space.

72. The only discernible distinction made by the position taken by defendants Wolf and Levine in their orders and guidance prohibiting enclosed malls to reopen in the Yellow Phase appears to be that Millcreek Mall's interior business tenants do not have direct external access but instead only can be accessed through the mall common area.

73. To date, defendants Wolf and Levine have not provided any justification (nor does any justification exist) for this arbitrary distinction, nor have they provided any rationale for how

this arbitrary distinction decreases harm to the public as compared to allowances which have been made for businesses not located within an enclosed mall and for businesses located within an enclosed mall but with external access, or any rationale for why appropriate and effective mitigation strategies cannot be employed.

D. Interior Essential Businesses Are Permitted To Operate In Yellow Phase

74. Ironically, two retail businesses within the Millcreek Mall enclosed mall, not having external access but which meet the criteria of "life sustaining" businesses -- Visionworks (optical retail) and Scrubs & Beyond (medical garb and PPE) -- have operated during the lengthy Business Shutdown Order period despite the closure of all other Millcreek Mall businesses without external access.

75. In order to operate, these "life sustaining businesses" have been lawfully permitted to allow their customers to enter the Millcreek Mall interior common area spaces in order to patronize those businesses, while all other mall tenants without external access have not been permitted to remain open.

76. Millcreek Mall tenants include several other "life sustaining businesses" which have not been able to operate despite their unrestricted status because the mall's closure renders it not economically or otherwise feasible to do so.

77. These businesses include the following Food Court or other eateries within the Millcreek Mall but without external access:

- a. Baskin Robbins / Dunkin Donuts
- b. Starbucks
- c. Suzie B's Pretzeltown (2 locations)
- d. Auntie Anne's / Cinnabon

- e. Subway
- f. Sbarro
- g. Fresh Healthy Café
- h. China Star
- i. Charlie's Philly Steaks
- j. Rocky Mountain Chocolate Factory

78. Although technically permitted to open, these businesses could not economically open because they depend upon Millcreek Mall patron traffic for their customer base.

79. Several of these businesses (Subway, Dunkin Donuts), which are not corporate stores but are franchises owned and operated by local residents and citizens of Erie County or nearby communities, have been competitively disadvantaged in comparison to their direct competitors who have been permitted to open because they are not located within Millcreek Mall. For example, a Subway or Starbucks located inside a Walmart or Target would be permitted to operate in a yellow county.

E. Retailers Leasing Space Within "Big Box" Stores Are Permitted To Open In The Yellow Phase

80. The arbitrary, capricious and unreasonable continued closure of Millcreek Mall, and the resulting closure of more than 100 of the Mall's retail business tenants lacking external access, is further illustrated by the fact that many large retail stores such as Walmart, Target, JC Penney and Macy's, which are permitted to open in the Yellow Phase, lease or sub-lease space

within their stores to third party business tenants such as cosmetics purveyors, restaurants and banks.

81. These "store-within-a-store" arrangements are in fact mini-malls, where large retailers rent out retail space to business tenants, often giving these tenants complete autonomy over the leased portion of the store.

82. Like an enclosed mall environment, tenants leasing space in these store-within-a-store arrangements within retailers such as Walmart, Target, JC Penney and Macy's operate autonomously other than adherence to certain terms such as specific hours of operation.

83. Under the orders and guidance issued by defendants Wolf and Levine, retail businesses without external access leasing space in an enclosed mall such as Millcreek Mall are not permitted to open during the Yellow Phase, yet retail businesses without external access leasing space in stand-alone retailers such as Walmart, Target or department stores are permitted to open during the Yellow Phase.

F. Economic Impact

84. For 45 years, Millcreek Mall has been the economic catalyst for retail within the region. The Mall directly and indirectly employs thousands of hard working Pennsylvanians.

85. Since the advent of e-commerce, enclosed mall owners and their retail occupants have experienced significant hardship. These mall-based retail businesses truly may not be able to withstand prolonged closures, particularly when their competitors throughout Erie and nearby counties (including some in the parking lot right outside their doors) are permitted to conduct business.

86. The arbitrary, capricious and unreasonable closure of the Millcreek Mall, without any articulated rationale by defendants Wolf or Levine, has caused and will continue to cause

irreparable harm to plaintiff Cafaro-Peachcreek and to the many businesses inside the enclosed mall without external access and does not materially enhance the health and safety of the general public.

87. Retail stores within the Millcreek Mall which have been ordered to remain closed by defendants Wolf and Levine directly and indirectly employ thousands of local residents, and the continued closure adversely affects thousands of local families who depend upon those jobs.

88. Retail stores within the Millcreek Mall closed by the orders of defendants Wolf and Levine have been forced to suffer harm not imposed upon similarly situated retail stores located away from Millcreek Mall, simply because these stores do not have external access and are accessible only from the mall corridors. The decision to keep these businesses closed, without any rational basis, is arbitrary and unfair, especially when compared to retailers in strip plazas, malls and free standing buildings.

G. Millcreek Mall Is Safer Than Similarly Situated Retail Businesses Allowed To Reopen

89. With few exceptions, the current orders and guidance issued by defendants Wolf and Levine allow most retail businesses in Yellow Phase counties, including Erie County, as well as Green Phase counties throughout the Commonwealth, to open subject to mitigation requirements.

90. Neither the aforementioned orders nor any communication from defendants' offices has provided any -- much less a legitimate -- rationale for the distinction being made which forces Millcreek Mall and most of its retail tenants to remain closed.

91. Unlike densely populated areas in the eastern regions of Pennsylvania where mega malls such as the King of Prussia Mall attract huge crowds nearly every day of the year, the business cycle at malls in most other less urban parts of Pennsylvania is much different.

92. In fact, over one-third of Millcreek Mall's annual business and corresponding retail traffic occurs during the fourth quarter traditional holiday shopping season.

93. During the spring and summer months, retail traffic at Millcreek Mall typically is modest, particularly when the Mall is not hosting a spectator event or attraction that promotes the gathering of people at the center court common area.

94. While destinations like Millcreek Mall will attract customers (as do Walmart, Home Depot and Giant Eagle), its customers generally are dispersed over in excess of 1,000,000 square feet of common area and tenant retail space in which each individual retail space has a separate and distinct air ventilation system and is separated by walls and wide entrances which remain open during business hours.

95. Even while patrons walk in concourses, malls typically have a constant movement of transient shoppers who are easily able to avoid contact with others – particularly when food court seating and children's areas have been removed/closed and other mitigation measures have been implemented and enforced.

96. Numerous states throughout the country have allowed enclosed malls like Millcreek Mall to reopen, including internal retail businesses, through the implementation of common sense mitigation strategies that are in place for non-mall retailers in Pennsylvania in counties in both the Yellow and Green Phases.

97. As stated, the only discernible factor distinguishing the vast majority of retail businesses that are allowed to be open from those businesses in enclosed malls not permitted to be open is the presence or absence of external access to the business in a mall setting.

98. This purported distinguishing factor does not support the defendants' arbitrary and capricious action precluding Millcreek Mall and its interior businesses without external access from opening once Erie County achieved Yellow Phase status.

99. In fact, there are many factors pertaining to Millcreek Mall and its interior retail business tenants which plaintiff Cafaro-Peachcreek and others have made known to defendants Wolf and Levine, which render the opening of Millcreek Mall as safe as allowing other retail businesses in non-mall settings to open, if not safer. These factors include, but are not limited to the following:

- a. Common and leased areas inside Millcreek Mall must comply with the same air quality standards and codes as businesses permitted to operate while the county is in the Yellow and/or Green Phase;
- b. Each tenant space has a maximum occupancy requirement which allows those tenants to comply with mitigation requirements limiting occupancy to a percentage of maximum allowed occupancy;
- c. Mall common areas open to the public generally consist of main and side corridors through which the public moves from store to store;
- d. These common area corridors are very wide, much wider than typical sidewalks fronting strip malls and plazas (Colony Plaza, Grove City Outlets) or in retailers currently permitted to operate (Walmart, Home Depot, Giant Eagle), allowing movement of customers with greater social distancing;
- e. Due to the width of the common area corridors, pedestrian traffic can easily maintain social distancing which is not always the case with narrower sidewalks found in strip malls or plazas;
- f. The height of the ceilings in these common areas ranges from 15 feet in lower traffic secondary corridors to 30½ feet in the main corridors, which is far greater than most retail businesses in strip malls, plazas or stand-alone buildings;
- g. Unlike stand-alone or street front/strip mall retailers, interior tenant retail spaces do not have doors that must be opened each time a customer enters the business, as all interior mall retail businesses have open and wide entrances from the mall corridors, thus allowing customers to enter individual retail businesses without touching a door handle;

- h. Once a customer enters an interior mall business, and assuming that required mitigation strategies are in place, it is no different than entering any business that is permitted to be open;
- i. Mall patrons tend to move from one store to another while using mall corridors, and measures can be taken by mall officials including, but not limited to, security guards to ensure that patrons do keep moving and do not congregate; and
- j. Unlike stand-alone street front retailers that are not governed by unified ownership or an entity that can oversee, closely monitor, and report to authorities infractions with regard to cleaning, social distancing, or the lack of face coverings, an enclosed mall is able to promptly respond to and enforce the dictates of the Governor's guidance.

To date, defendants have not disputed (or even acknowledged) any of these factors.

H. Plaintiff Cafaro-Peachcreek Remains Prepared To Implement Strict And Compliant Mitigation Measures

100. The Millcreek Mall's expansive corridors and other common space areas accessible to the general public allows for greater social distancing, particularly when compared to the aisle spaces in other retail businesses now permitted to be open, including those Millcreek Mall retail establishments with external access currently allowed to be open.

101. The Millcreek Mall's enclosed mall environment is better able to accommodate social distancing than any box retail store, yet the Millcreek Mall has been singled out, seemingly only because its common area corridors are enclosed by a roof.

102. Mall owners and operators throughout the country already have successfully implemented many, if not all, of the same or substantially similar guidance protocols in effect in Pennsylvania for non-mall retailers.

103. As stated above, Cafaro affiliated companies currently own and operate 12 enclosed malls in nine states.

104. The Millcreek Mall in Erie County, Pennsylvania is the only such enclosed mall which has not been permitted to reopen.

105. Plaintiff Cafaro-Peachcreek is prepared to safely reopen the Millcreek Mall in strict adherence with the same guidelines in effect all other non-mall retailers who have been permitted to reopen since May 8, 2020 and who have been enjoying a competitive advantage over the mall's interior tenant businesses for many weeks.

106. Plaintiff Cafaro-Peachcreek has been and remains willing and able to take all necessary actions necessary to strictly abide by state and federal guidelines which prioritize the safety and well-being of our communities.

107. In addition to and in some instances beyond the measures set forth in Pennsylvania's guidance, plaintiff Cafaro-Peachcreek is willing and able to implement and enforce social distancing and other mitigation measures which include but are not limited to the following:

- a. adherence to all Commonwealth and CDC guidance and recommended best practices for mitigation and social distancing;
- b. adherence to relevant mitigation and social distancing measures set forth in the "Covid-19 Re-Opening Best Practices" published by International Council of Shopping Centers, a copy of which is attached as Exhibit F;
- c. adherence to plaintiff's own best practices and policies;
- d. restricting available seating in common areas;
- e. eliminating attractions in common areas which otherwise would encourage patrons to congregate;
- f. reducing or eliminating indoor seating in the Food Court and in the vicinity of other tenants which sell food as necessary to comply with restrictions placed upon indoor dining;
- g. utilizing mall employees and security guards as appropriate to encourage social distancing and mitigation measures in common areas, including all entrances to mall common areas.

108. In an arbitrary and capricious manner, defendants Wolf and Levine have issued guidance concerning an easing of stay at home restrictions for certain counties, which is inconsistent with the available statistical data and health precautions recommended by the CDC.

109. Defendants Wolf and Levine will continue to prohibit plaintiff Cafaro-Peachcreek from operating their businesses while permitting other similar businesses to operate in other counties within Pennsylvania and, in fact, allows competitor businesses to operate within the same county and region.

110. Plaintiff Cafaro-Peachcreek can implement the same safety precautions, policies and procedures that similar businesses located inside or outside of Erie County have been permitted to implement in order to resume business operations.

111. The Business Shutdown Order issued by defendants Wolf and Levine have been issued pursuant to their alleged authority as Governor and Secretary of Health under Pennsylvania's Emergency Code, 35 P.S. 7301, et. seq. and Administrative Code, 71 P.S. §§ 532, 1403.

112. Plaintiff Cafaro-Peachcreek has invested a tremendous amount of financial resources, time and effort into all aspects of its business, including, but not limited to, the purchase or lease of equipment, inventory and physical business facilities; advertising; training and hiring of employees; and customer development, as well as other expenses such as rent or mortgage payments.

113. In an arbitrary and capricious manner, defendants Wolf and Levine have expressed an intention to deprive plaintiff Cafaro-Peachcreek of the economic benefits and use of its property while permitting similar businesses to operate and compete against its business.

114. Defendants' orders have so deprived plaintiff Cafaro-Peachcreek of the economic benefits and use of its property that the resulting financial impact will adversely impact its business for an indefinite period and, unless immediately rescinded, threaten the future viability and sustainability of the business.

115. There is no reasonable or substantial basis between defendants' orders permitting one business to operate in a county while prohibiting a similar business from operating in the same or an adjacent county when both businesses are capable of implementing the same safety precautions, policies and procedures; are serving customers from multiple counties; are located within a short distance of each other; and are separated solely by the geographic county-lines established within the Commonwealth; especially when the business that is not permitted to operate is more conducive to safe operations and social distancing than many businesses that are permitted to operate.

116. Defendants Wolf and Levine have taken plaintiff Cafaro-Peachcreek's private property without due process of law.

COUNT I
VIOLATION OF EQUAL PROTECTION - 42 U.S.C. § 1983
(Millcreek Mall Compared to other Erie County And Statewide Retailers)

117. All preceding paragraphs are incorporated herein.

118. The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV.

119. "The Equal Protection Clause protects persons, not groups, and the Clause's protections apply to administrative as well as legislative acts." *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 597 (2008) (internal citations and quotations omitted).

120. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

121. A plaintiff can successfully bring an equal protection claim "where the plaintiff alleges that s/he has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

122. Further, state action that lacks any uniform set of standards or rules to ensure uniform treatment does not satisfy the minimum requirement for non-arbitrary treatment under the equal protection clause. *See Bush v. Gore*, 531 U.S. 98 (2000).

123. As set forth above, plaintiff Cafaro-Peachcreek's Millcreek Mall and its retail tenants without external access are not permitted by defendants' actions to open and conduct business during the Yellow Phase, while otherwise similarly situated large retailers such as Walmart and Target are permitted to open and operate as "mini-malls" leasing space to independent retail business tenants also without external access.

124. Likewise, retail businesses without external access leasing space within large retailers such as Walmart and Target are permitted to open and conduct business during the Yellow Phase, while Millcreek Mall's similarly situated retail tenants are not permitted to open during the Yellow Phase.

125. Furthermore, plaintiff Cafaro-Peachcreek's Millcreek Mall currently is the only enclosed mall in Pennsylvania not permitted to open, with the exception of enclosed malls in eastern Pennsylvania located in counties which remain in Yellow Phase.

126. There is no rational, non-arbitrary basis for treating plaintiff Cafaro-Peachcreek's Millcreek Mall differently than otherwise similarly situated enclosed malls or other retailers in Pennsylvania simply because Millcreek Mall is located in Erie County which remains, irrationally, in the Yellow Phase.

COUNT II
VIOLATION OF EQUAL PROTECTION - 42 U.S.C. § 1983
(Erie County Compared To Other Pennsylvania Counties)

127. All preceding paragraphs are incorporated herein.

128. The Governor's "Process to Reopen Pennsylvania" purports to be a "measured and strategic approach" for Pennsylvania to return to work safely, based on "data-driven" decision making. <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

129. The Commonwealth has set up the "Pennsylvania County Dashboard" to track Pennsylvania counties on the basis of the following four metrics, which, if met, means that a county can move from "Yellow" to "Green":

- a. Stable, decreasing, or low confirmed case counts, past 2 weeks compared to previous 2 weeks;
- b. Contacts of cases are being monitored;
- c. PCR positivity rate <10% in past 14 days; and
- d. Hospital bed use is 90% or lower per district population.

130. "Stable, decreasing, or low confirmed case counts, past 2 weeks compared to previous 2 weeks" is met if:

- a. "[The] percent change in newly reported confirmed cases comparing the last two 14-day intervals is less than or equal to 10% i.e. (Confirmed cases reported in past 14 days – Confirmed cases reported in previous 14-day period)/Confirmed cases reported in previous 14-day period) <=10% [expressed below in a formula]; OR

$$\frac{\text{Confirmed cases in past 14 days} - \text{Confirmed cases in previous 14 days}}{\text{Confirmed cases in previous 14 days}} \leq 10\%$$

- b. "Confirmed case rate in the past 14 days is <= 25 cases/100,000 population"; OR
- c. "Number of confirmed cases reported in the past 14 days is <=10."

131. "Contacts of cases are being monitored" is met if contact tracing is being done or is being implemented in the county.

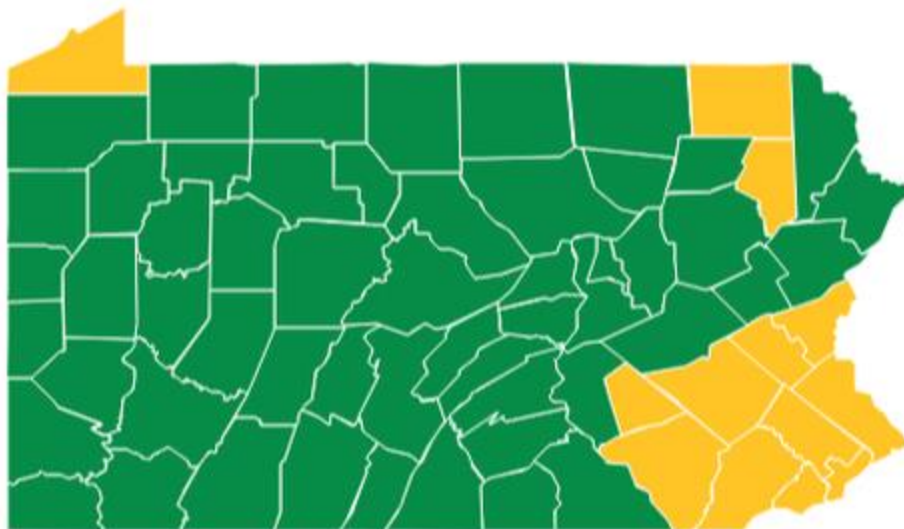
132. "PCR positivity rate <10% in past 14 days" is met if the number of people who had a positive PCR test for COVID-19 in the past 14 days is <10% of the total number of people tested by PCR in the past 14 days.

133. "Hospital bed use is 90% or lower per district population" is met if the percent of total hospital ICE and Med surge beds that are currently occupied is $\leq 90\%$ in the region.

134. On the Pennsylvania County Dashboard, applying the Governor's metrics, Erie County has met all metrics aside from "stable, decreasing, or low confirmed case counts, past 2 weeks compared to previous 2 weeks."

135. Erie County was among the first counties in Pennsylvania to move from Red Phase to Yellow Phase, at which time the criteria announced were: low per-capita case counts, the ability to conduct contact tracing and testing, and appropriate population density to contain community spread; but, under the new, and, as discussed below, arbitrary and capricious metrics, Erie County remains in the Yellow Phase.

136. Erie County is now the only county in the western half of Pennsylvania that is not "Green" or moving to "Green" on June 19, 2020, as seen as the island of yellow in the sea of green on the map below.



137. Assessing the data and methodology used, Erie County has been subject to disparate treatment by the Commonwealth in an arbitrary and capricious manner.

138. Below, as of June 12, 2020, is a compilation of the data used by the Commonwealth¹ with respect to Erie County and comparative counties moving from Yellow to Green:

County	Status	Population	Cases of COVID-19	Negative Tests	% of Tests w/ Positive	Positive Cases Per Capita
Erie	Yellow	272,061	439	7,339	5.64%	0.16%
Dauphin	Green	277,097	1,587	13,098	10.81%	0.57%
Luzerne	Green	317,646	2,823	14,265	16.52%	0.89%
York	Green	448,273	1,141	17,096	6.26%	0.25%

139. Early on, Erie County, as well as all of the Northwestern Region, took decisive measures to comply with health and safety orders to stop the spread of COVID-19.

140. As indicated in the total cases set forth above, Erie County has done a better job, comparatively to the other counties listed, in stopping the spread of COVID-19, which has resulted in fewer total positive cases.

¹ All data used herein was obtained from the Department of Health's online archives, available here: <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Archives.aspx> (last accessed June 13, 2020).

141. This is true controlling for population as well.

142. In fact, Erie County has a lower percentage of positive tests (5.64% of those tested), compared to Dauphin County (10.81% of those tested), Luzerne County (16.52% of those tested), and York County (6.26% of those tested).

143. Furthermore, Erie County has a lower percentage of positive cases per capita (.16% of the population with suspected or confirmed case) than Dauphin County (.57%), Luzerne County (.89%), or York County (.25%).

144. Therefore, compared to Dauphin County, Luzerne County, and York County -- all of which are moving to Green while Erie County is staying in the Yellow phase -- Erie County has a lower total case count, a lower rate of positive cases, and a lower percentage of the population with a positive case.

145. Simply put, citizens of Dauphin County, Luzerne County and/or York County are more likely to have COVID-19 and more likely to be exposed to COVID-19 than citizens of Erie County.

146. Despite the empirical fact that Erie County is safer, the aforementioned counties are having restrictions lifted and moving to the Green Phase, while Erie County must arbitrarily remain in the Yellow Phase, subject to more stringent restrictions.

147. There is no basis to conclude that going to an indoor mall in Erie County is more dangerous than going to an indoor mall in Dauphin County, Luzerne County, or York County.

148. While the criteria used in assessing whether a county can move from Yellow to Green is facially neutral, it results in arbitrary and capricious disparate treatment as applied to Erie County, which must remain in Yellow Phase, while counties with more total cases and a higher incidence of COVID-19 may proceed to the Green phase.

149. In addition to resulting in arbitrary and disparate treatment of Erie County, the methodology underlying the Commonwealth's "data-driven" approach is fatally flawed.

150. The only metric that Erie County does not meet is: "Stable, decreasing, or low confirmed case counts, past 2 weeks compared to previous 2 weeks."

151. As explained in the technical notes to the County Dashboard, this metric is met when "[the] percent change in newly reported confirmed cases comparing the last two 14-day intervals is less than or equal to 10%."

152. This metric is met, and most easily understood, by reference to the mathematical formula utilized by the Commonwealth, as follows:

$$\frac{\text{Confirmed cases in past 14 days} - \text{Confirmed cases in previous 14 days}}{\text{Confirmed cases in previous 14 days}} \leq 10\%$$

153. The metric used by the Commonwealth does not take into account the number of tests, only the number of confirmed cases.

154. As a result, this public health measure disincentivizes testing to the extent more testing results in more confirmed cases.

155. The flaw of this metric is best explained by way of example, again using the metrics that the Commonwealth has reported.

156. The following table contains the total cases in Erie and York Counties on the dates stated. Each date is seven days apart.

	Erie County	York County
Total Cases on 6/12	439	1,141
Total Cases on 6/5	332	1,040
Total Cases on 5/29	253	991
Total Cases on 5/22	190	895
Total Cases on 5/15	129	828

157. The following table contains the new cases between the weeks listed.

	Erie County	York County
6/5-6/12 (Week 4)	107	101
5/29-6/5 (Week 3)	79	49
5/22-5/29 (Week 2)	63	96
5/15-5/22 (Week 1)	61	67

158. As shown in the tables, during Weeks 1 and 2, Erie County had 124 new cases and York County had 163 new cases, and during Weeks 3 and 4, Erie County had 186 new cases while York County had 150 cases.

159. Without taking into account the number of tests, however, the number of positive cases reported is of no statistical or analytical value.

160. The total number of tests on a certain date can be approximated by adding the number of cases and the number of negative tests. For the four weeks above, the approximate number of tests performed in Erie County and York County for each week is as follows:

	Erie County	York County
6/5-6/12 (Week 4)	1,479	2,377
5/29-6/5 (Week 3)	1,270	1,387
5/22-5/29 (Week 2)	1,181	2,205
5/15-5/22 (Week 1)	764	1,810

161. During the period in question, Erie County continually increased testing which, unsurprisingly, led to increasing "positive tests" for COVID-19 as a result.

162. On the other hand, during Week 3, York County completed 743 fewer tests than it averaged during Weeks 1, 2, and 4. Unsurprisingly, during Week 3, York County experienced a significant "drop" in positive cases.

163. As a result of this "drop," York County has fewer cumulative cases during Weeks 3 and 4 (the "past two weeks") than during Weeks 1 and 2 (the "previous two weeks").

164. However, if Week 3 in York County was similar to Weeks 1, 2, and 4, York County would not have met the "stable, decreasing, or low confirmed case counts declining cases" criteria.

165. In fact, had York County reported 88 cases during Week 3, which is the average number of cases over Weeks 1, 2, and 4, then York County would have failed the "stable, decreasing, or low confirmed case counts declining cases" metric.

166. The result in York County, where a drop in cases -- without controlling for the number of tests -- leads to a county moving from Yellow to Green, incentivizes lower testing.

167. The Equal Protection clause protects plaintiff Cafaro-Peachcreek from arbitrary government action that results in disparate treatment from those similarly situated.

168. The defendants' actions here, during a public health emergency, result in counties with more total cases and counties in which a person is more likely to test positive, to reopen, while forcing Erie County to stay closed.

169. Furthermore, the methodology used by the government incentivizes lower testing during the public health emergency.

170. The government's actions undermine the public health that they are designed to protect.

171. In application, the government's actions have proven to isolate Erie County -- being the only county in the western half of the state unable to reopen -- while permitting counties in which people are objectively at a higher risk of contracting COVID-19 to open.

172. There is no rational basis to favor areas of higher risk over areas of lower risk during a public health emergency.

173. The government's actions serve to arbitrarily restrict operations in Erie County while disincentivizing testing and permitting areas of greater community spread to reopen.

174. The government's actions isolate Erie County, arbitrarily preventing the people and businesses of Erie County, including plaintiff Cafaro-Peachcreek, from reopening in the "New Normal." Such government action denies plaintiff Cafaro-Peachcreek equal protection of the laws.

COUNT III
VIOLATION OF PROCEDURAL DUE PROCESS - 42 U.S.C. § 1983

175. All preceding paragraphs are incorporated herein.

176. The Fourteenth Amendment to the United States Constitution, applying the Fifth Amendment due process clause to the states, forbids a state from depriving anyone of life, liberty, or property without due process of law.

177. Plaintiff Cafaro-Peachcreek has a legitimate claim of entitlement to operation of its business in the category of property interests protected by procedural due process.

178. Ownership and unrestricted use and enjoyment of land is a property interest requiring analysis of procedural due process.

179. Before a governmental body may deprive an owner of a property interest, it must provide adequate due process procedures.

180. Although the exact process required varies with the demands and exigencies of a particular situation, a balancing of private interests and value of additional procedural safeguards against fiscal and administrative burdens imposed on the government weighs in favor of plaintiff Cafaro-Peachcreek herein.

181. Procedural due process analysis requires consideration of whether the following has been provided: notice of the governmental action, a neutral arbiter, an opportunity to make an oral presentation, a means of presenting evidence, the ability to cross-examine witnesses and respond to written evidence, the right to representation by legal counsel, and a decision based on the record with a statement of reasons in support of the decision.

182. The Business Shutdown Orders and subsequent guidance on each do not provide any of the foregoing procedural due process protections.

183. The Governor's shut down of the waiver review process with the Department of Community and Economic Development ("DCED"), without any explanation and/or alternative means for review, constitutes an unexplained inconsistency, is arbitrary and capricious.

184. Regardless, the waiver process did not exist to provide waivers to businesses that are not life-sustaining, and therefore plaintiff Cafaro-Peachcreek never applied for any waiver.

185. Further, at no time did the Governor permit citizens of the Commonwealth of Pennsylvania to request an exemption to the closure orders through a waiver form.

186. Additionally, even a temporary, nonfinal deprivation of property is nonetheless a deprivation in terms of the Fourteenth Amendment.

187. Defendants' Business Closure Orders and subsequent orders and related amendments and guidance have been anything but temporary, being issued March 19, 2020 and March 23, 2020, respectively, and continuing indefinitely and, as of present, unrestrained by Pennsylvania courts.

188. Even assuming the temporary nature of these orders, defendants Wolf and Levine have provided none of the elements in order to safeguard plaintiff Cafaro-Peachcreek's procedural due process rights.

189. The relevant inquiry for procedural due process is not whether an order should have issued, but whether the procedure itself is incapable of affording due process.

190. As of the date of filing this Complaint, no procedural due process has been afforded to plaintiff Cafaro-Peachcreek.

191. Finally, the inconsistent, arbitrary, and capricious decisions and rationale, or lack thereof, being disseminated by the executive bodies of this Commonwealth has led to further confusion by plaintiff Cafaro-Peachcreek, and arguably all Pennsylvania citizens, on how to safeguard procedural due process with respect to their property interest.

192. Plaintiff Cafaro-Peachcreek is capable of following state and federal (CDC) guidelines with respect to social distancing and other mitigation efforts as set forth in detail above.

193. If defendants Wolf and Levine will not avail plaintiff Cafaro-Peachcreek of the opportunity to prove its ability to comply with applicable guidance, Cafaro-Peachcreek requests that at a minimum it be afforded the procedural due process to which they are constitutionally entitled.

REQUEST FOR RELIEF

WHEREFORE, plaintiff Cafaro-Peachcreek demands judgment in its favor and against defendants Wolf and Levine jointly and severally, and seeks relief as follows:

- (1) a Preliminary Injunction to permit plaintiff Cafaro-Peachcreek to operate and prohibit defendants from enforcing the arbitrary and capricious restrictions currently restricting plaintiff;
- (2) a Permanent Injunction to prohibit defendants from enforcing the Business Shutdown Order and Yellow Phase restrictions in the manner and fashion engaged by defendants, by the elimination of the arbitrary and capricious system restrictions upon plaintiff Cafaro-Peachcreek and Erie County which prohibit plaintiff Cafaro-Peachcreek's operations, depriving plaintiff Cafaro-Peachcreek of full economic value of its property;

- (3) declaration that the rights of the plaintiff Cafaro-Peachcreek and the citizens of the Commonwealth have been violated by the various actions of the defendants and that said defendants are enjoined from engaging in such violations henceforth;
- (4) award of costs and expenses, including reasonable attorneys' fees under 42 U.S.C. § 1983 and 1988; and,
- (5) such other relief as this Court deems appropriate.

Respectfully submitted,

s/Matthew W. McCullough

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